In relation to a grant of Letters of Administration the "any person" to which paragraph (d) refers is the administrator and the grant is conclusive that he is entitled to the property properly passing to an administrator from the date of the grant.

This particular section has been considered many times by the Courts of India and particularly in the case of *Arunmoyi* v. *Mohendra.*[5] In that case the Court held, at page 894, "that in a proceeding upon an application for probate of a will, the only question which the Court is called upon to determine is whether the will is true or not, and that it is not the province of the Court to determine any question of title with reference to the property covered by the will."

In the case of *Behary* v. *Juggo,*[6] at page 3, the Court said ". . . . . upon an application for probate of a will, as long as it is made *bona fide*, it is not the province of the Court to go into questions of title with reference to the property of which the will purports to dispose."

Woodroffe's and *Ameer Ali's Law of Evidence,* 9th edition, in discussing the above cases in relation to section 41 of the Indian Evidence Act, 1872, at page 421 says: — "A grant of letters of administration with the will annexed, does not make any question as to the title to property covered by, or as to the construction of the will, *res judicata* in a subsequent suit in which such title or construction comes in issue."

In the same manner it appears to me that when the Court grants Letters of Administration it does not go into questions of title as to the assets disclosed in the affidavit of the petitioner any more than it goes into the right of a testator to the property of which he purports to dispose in his will.

The principal object of the schedule to the grant of Letters of Administration appears to be for the purpose of ensuring that correct security is given. It does not prove the deceased's title to the property scheduled.

In this particular case the administrator has come to the Court seeking a declaratory order that certain property which he has included in the list of the deceased's assets was in fact the deceased's property. To that extent, therefore, the administrator is seeking the guidance of the Court in administering the assets of the deceased, a right which he has under section 69 of the Probate and Administration Enactment of Trengganu.

I consider therefore that as between the plaintiffs and the defendant it has never been *res judicata* that the property in the schedule to the grant was the deceased's property at his death.

I have had the benefit of reading the judgment of the learned Chief Justice and agreed with his view of the law, findings of fact and consequential orders, including the proposed order for costs.

I would add that if it were not necessary in this case to decide whether the business belonged to the father or to his third son, the defendant, I would on the facts myself have held that the probabilities are that the business was started by the defendant with a very great deal of help from his father. During the lifetime of the father, the father was in effect the principal partner and was generally regarded in the district as the owner of the business. I think it probable that he did not regard himself as the sole owner because when he bought the shares in the Bus Company he bought them in the name of the Chop and not in his own name. I think the probabilities are that he intended when he died that the defendant should have the business. This would be very natural since the probabilities are that the businesses of the other brothers had been started with capital provided by the father from the first business. Since, however, it is necessary to decide as a matter of probability whether the business belonged to the father or the defendant exclusively, I agree with the learned Chief Justice that the probabilities are in favour of the father and I therefore respectfully agree with him rather than with Ong J. whose judgment I have had the benefit of reading.

Ong J. agreed with the views expressed by Thomson C.J. and Smith J. on the question of law, but differed as to the finding of facts.

Order of trial Judge varied.
Appeal allowed.

Solicitors: *Lovelace & Hastings; Maidin bin Mohamed Ibrahim.*

CHOW YOONG HONG v. TAI CHET SIANG

[J. C. (Lord Goddard, Lord Jenkins and the Rt. Hon. L. M. D. De Silva) October 8, 1959]

[Privy Council Appeal No. 35 of 1958]

Contract — Sale of house — Deposit in earnest — High price — Purchaser unwilling to pay balance of purchase money until title to property had been checked by Solicitor — But anxious to complete purchase at all material times — Time not the essence of contract — Contract not repudiated by purchaser — Vendor not entitled to forfeit deposit.

In this case the plaintiff (respondent) sued the defendant (appellant) for the return of a deposit of $5,000 paid by the plaintiff to the defendant as a deposit under a contract entered into between the parties for the sale by the defendant to the plaintiff of a house in Kuala Lumpur.

The defendant opposed the plaintiff's claim on the ground that the bargain had gone off through the plaintiff's default and that circumstances had accordingly arisen in which he was entitled to forfeit the deposit. The defendant's case seemed to rest substantially on the contention that the plaintiff had repudiated his bargain because he came to the conclusion that the price he had agreed to pay was too high, and indeed it was said by the defendant that at a particular interview of the 29th February, 1956, the plaintiff had definitely refused to complete. The plaintiff on his part denied that the alleged interview ever took place. He further maintained that at all material times he was ready and

willing to complete the purchase but stipulated that before he did complete the defendant's title to the property should be investigated by his solicitor. Several letters subsequently passed between the parties and there was nothing inconsistent in any of them with the plaintiff's version of what occurred. Moreover, there was no letter written by the defendant referring to the alleged repudiation on February 29th.

In his Statement of Defence the defendant admitted that he had agreed to sell the property to the plaintiff and he did not even mention the alleged repudiation of the contract on February 29th. He was allowed, nevertheless, to give evidence of the alleged repudiation without substantial amendment of his pleadings. The learned trial Judge in a very short and unhelpful judgment found for the defendant.

The Court of Appeal unanimously reversed the decision of the learned trial Judge. The Court emphasised the principle that it would not lightly disturb a finding of fact recorded by the trial Judge. Nevertheless it could and should consider whether the proper inferences had been drawn by the trial Judge from the facts which were not in controversy. The Court held that the only possible inference to be drawn from such facts was that the plaintiff was at all material times anxious and ready to complete the purchase.

The defendant appealed to the Privy Council.

Held: on the evidence as a whole, the plaintiff was in fact at all times ready and willing to complete the purchase, and accordingly he was entitled to the recovery of his deposit.

Judgment of the Court of Appeal affirmed.

Case referred to:—

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370; [1955] 2 W.L.R. 418; [1955] 1 All E.R. 326.

COURT OF APPEAL.

M. Edgar for the appellant.

D. G. Rawson for the respondent.

Thomson C.J.: I have had the benefit of reading the judgments which are about to be delivered by the Acting Chief Justice of Singapore and by Mr. Justice Smith and agree that for the reasons stated by Mr. Justice Knight this appeal should be allowed with costs.

Knight Ag. C.J. (S.): This is an appeal from a decision of the learned trial Judge in which he found that the plaintiff/appellant had repudiated a contract he had made with the defendant/respondent on 6th October, 1955 to purchase a house situated at No. 27 Malay Street, Kuala Lumpur.

It was admitted in the Court below that towards the end of 1955 the Administrators of the estate of one Abdullah bin Haji Mohamed Taib (deceased) decided to dispose of three houses in Malay Street which were the property of the estate. At or about that same time the defendant/respondent, who is a textile merchant in business in Kuala Lumpur, heard that these houses would shortly be offered for sale and being interested to acquire them as a speculation he visited the vendor's solicitors (Messrs. Shearn Delamore & Co.) and paid a deposit of $10,000 towards the then agreed purchase price of $75,000. He was informed by the solicitors that a Court order approving the sale of these properties would have to be obtained and he undertook to complete the purchase within 14 days of the date of that order — failing which he would forfeit his deposit.

On the evening of 6th October 1955 the plaintiff/appellant, who at that time was a tenant of No. 27 Malay Street (one of the properties being disposed of by the estate) was brought to the premises of the respondent and, after some discussion, an agreement was drawn up whereby the appellant agreed to purchase the house in which he was living from the respondent for $33,000 and paid a deposit of $5,000 as "earnest money". The agreement also contained the following words:—

"All transfer proceedings as drawn up by a lawyer will be followed . . . . ."

On January 30th 1956 the Court gave formal consent to the sale of the three properties but as a higher offer than that made by the respondent had been received from another possible purchaser, it was ordered that the purchase price should be increased to $80,200. The effect of this order was communicated by letter dated 3rd February 1956 to the respondent, who agreed to pay the enhanced figure and undertook to complete by 3rd March 1956. The respondent then started to press the appellant for payment of the $28,000 outstanding under the agreement of 6th October 1955 and finally, on 29th February had an interview with him at which, according to the respondent, a friend of his, named Lee Nget Fah, was present.

At that meeting, says the respondent, the appellant stated that he was unwilling to abide by the terms of his agreement because he had heard that in the meanwhile the respondent had agreed with a purchaser of another of the three houses to sell it to that purchaser for $3,000 less than the price he (the appellant) had agreed to pay for his house. In short, says the respondent, the appellant repudiated the contract of 6th October and with effect from that moment he (the respondent) considered it to be null and void and declared that the appellant's deposit of $5,000 should be forfeited.

The appellant denies that this alleged meeting between the respondent, Mr. Lee and himself ever took place. He maintains that at all material times he was ready and willing to complete the purchase but being an ordinary prudent man, he explains that he was unwilling to make this very large payment until the respondent's title to the property had been checked by his solicitor. Several letters passed between the parties and there is nothing inconsistent in any of them with the appellant's version of what took place. No letter, I might add, was addressed to the appellant by the respondent referring to his alleged repudiation of the contract on February 29th; but, on the contrary, the former in fact wrote to the respondent on 1st March asking him to produce his Title Deed at his convenience to a solicitor. Had he in fact repudiated the contract the previous day it is indeed remarkable how this letter came to be written at all and even more remarkable that

the respondent did not reply immediately to it saying that the contract had come to an end.

It was also admitted in the Court below that on 3rd March the respondent paid the purchase price i.e. $80,200 for the three houses to Messrs. Shearn Delamore & Co., that he subsequently transferred house No. 27 Malay Street to his wife for an alleged consideration of $25,100 (though in fact there is no evidence that she paid anything for it) and that at a later date she sold the house to the appellant for $33,000. Thereafter the appellant instituted these proceedings to recover the deposit of $5,000 he had made at the time of signing the agreement.

Such are the facts of this matter as they were elicited during the course of the trial but they bear no relation at all to the issues pleaded by the respondent. In his written Statement of Defence he admitted that he had agreed to sell the property to the appellant and nowhere in it does he even mention the whole crux of his case — namely the alleged repudiation by the appellant of the contract on February 29th. Why he was allowed to give evidence of this repudiation without a substantial amendment of his pleadings, escapes me; but, be that as it may, the learned trial Judge, in an extremely short judgment found that the appellant had in fact repudiated the contract, dismissed his claim and entered judgment for the respondent on the counterclaim.

Now this Court will not lightly disturb a finding of fact recorded by the trial Judge, who had the opportunity of seeing and hearing the witnesses — nevertheless it can and should consider whether the proper inferences have been drawn by the Judge from facts which were not in controversy: *Benmax* v. *Austin Motor Co. Ltd.*[1] Throughout the whole course of these proceedings the appellant has maintained that he agreed to purchase this property from the respondent and that he was at all material times willing to complete — provided only that the respondent should satisfy his solicitor that he had a good title. It is further established that on 13th March i.e. one day before the respondent was in a position to provide any title at all, the appellant once more offered (through his solicitors) to complete and that subsequently he did complete by paying $33,000 to the respondent's wife. In these circumstances how can it be said that he repudiated his contract? In my opinion the only possible conclusion to reach is that at all material times he *was* anxious to complete and that the respondent has fabricated the evidence as to the alleged repudiation and fabricated it, moreover, at some time subsequent to the filing of the defence, which would explain how so vital an allegation came to be omitted from the pleadings. Had this aspect of the matter occurred to the learned trial Judge he must inescapably, in my opinion, have drawn no inference other than one favourable to the appellant.

Much play has been made of the suggestion that time was of the essence in this contract — but this presents no difficulty. No mention of time was made in the agreement itself and it is quite impossible to read into it an undertaking by the appellant to complete before he was assured that he was getting a good title; indeed the reference to "the lawyer" would seem to confirm that very understandably he required assurance on this very point. I am also at a loss to see how the learned trial Judge concluded that the transaction should have been completed at the office of Messrs. Shearn Delamore & Co. According to Mr. Marsh of that firm, he had no knowledge whatsoever of the contract between the parties in these proceedings.

For the above reasons I would allow this appeal with costs here and in the Court below.

Smith J.: I have had the benefit of reading the judgment of the learned Acting Chief Justice of Singapore and am in agreement with him that there was no repudiation of the contract by the appellant and that consequently this appeal should be allowed with costs here and in the Court below.

Even in the respondent's own evidence of what took place on the evening of 29th February, 1956, I can find no clear proof of repudiation by the appellant. This is what the respondent said in evidence:—

> "I went to see plaintiff on 29.2.56 with a friend Lee Nget Fah. My object was to take plaintiff to Shearn Delamore. I saw plaintiff. He did not agree to complete. He asked for reduction in price of $3,000. He told me the other 2 houses were sold at $30,000 and there was no reason why he should pay more. I did not agree to reduce price. He would not complete unless price reduced by $3,000. I warned him if he did not complete his deposit would be forfeited. He was very angry and threatened to assault me. Nevertheless he refused to buy. In fact I had sold one of the houses for $30,000. That was to Amreek Singh. I told plaintiff his deposit would be forfeited."

Even if the words of the appellant did amount to a renunciation the words of the plaintiff that the deposit *would be* (not '*was*') forfeited do not shew that the respondent acted on the renunciation there and then. Nowhere in that passage does the respondent say that he treated the contract as at an end and the deposit forfeited that night.

Reading the passage as a whole it appears to me that the appellant threatened not to complete because the others were getting their houses cheaper and that the respondent in turn threatened that if the appellant did not complete his deposit would be forfeited. The position was clarified the very next day by the appellant writing to say that he was ready to complete and naming his solicitors.

PRIVY COUNCIL.

Lord Jenkins: In this case the plaintiff (now respondent), Mr. Tai Chet Siang, sued the defendant (now appellant), Mr. Chow Yoong Hong, in the High Court at Kuala Lumpur for the return of a deposit of 5,000 dollars paid by the plaintiff to the defendant as a deposit or

earnest, as it was called, under a contract, in the form of a receipt for the deposit, entered into between the parties for the sale by the defendant to the plaintiff of a house in Kuala Lumpur.

The defendant opposed the plaintiff's claim on the ground, to put it very shortly, that the bargain had gone off through the plaintiff's default and that circumstances had accordingly arisen in which he was entitled to forfeit the deposit. The defendant's case as ultimately developed in court rested, their Lordships think, substantially on the contention that the plaintiff had repudiated his bargain because he came to the conclusion that the price he had agreed to pay was too high. Indeed, it was said by the defendant that a particular interview of the 29th February, 1956, the plaintiff had definitely refused to complete.

An appreciation of the case demands a somewhat detailed consideration of the correspondence, and, indeed, it was referred to in great detail and with great care by Mr. Khambatta, who said all that possibly could be said on the defendant's behalf. As to the interview of the 29th February, assuming in the defendant's favour that it ever took place at all, their Lordships are quite satisfied from the subsequent correspondence that there was nothing in the nature of a repudiation at that interview. Looking at the documents and the evidence as a whole, it appears to their Lordships that the plaintiff was in fact at all times ready and willing to complete, but he stipulated, naturally enough, that before he did complete the title should be investigated by his lawyer. The learned judge in the High Court unfortunately did not deliver himself of a judgment from which the Court of Appeal could derive the assistance which an Appellate Court is entitled to expect from a judge of first instance. The learned judge said this: "I have considered the case for plaintiff and that for defendant. I am not without some sympathy for the plaintiff as the case has turned out for him, but in law and in fact I am satisfied that the transaction could, would and should have been completed at defendant's solicitor's office. That this was not done was due to plaintiff's resiling from his contract with defendant because he felt he had entered into a bad bargain." Their Lordships cannot regard that judgment as of any assistance either on the facts or on the law.

The plaintiff appealed to the Court of Appeal at Kuala Lumpur, and that court reversed the decision of the trial judge and gave the plaintiff the relief claimed. Mr. Khambatta has emphasised the principle that the greatest respect should be paid to the findings of fact of a judge of first instance, based on seeing and hearing the witnesses and forming an estimate of their credibility, and there is no doubt as to that principle; but it is a principle impossible of application where, as in the present case, the learned judge has unfortunately failed to make any intelligible findings of fact at all. The Court of Appeal felt obliged to go into the matter *de novo*, as their Lordships think quite rightly, and, having done so, came to the conclusion that the plaintiff's case was made good and that the defendant's allegations of repudiation were ill founded. It appears to their Lordships that the judgments of the Court of Appeal are impeccable both in their reasoning and their conclusion, and their Lordships see no reason whatever for disturbing the order made.

Accordingly, their Lordships will report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed, and the appellant ought to pay the costs of the appeal.

Appeal dismissed.

Solicitors: *Bannon & Bailey; Shearn Delamore & Co.*

MEK v. HAJI AHMAD

[C. A. (Thomson C.J., Good J.A., Smith J.) December 4, 1959]

[Penang — F.M. Civil Appeal No. 16 of 1959]

Mortgage — Transfer of land — Death of subsequent mortgagees — Whether action for recovering of land — Limitation — Period of — Limitation Enactment (Kedah), ss.26 and 33.

Sometime in 1926 the respondent (plaintiff and registered proprietor of four pieces of land in Kedah) charged two of the four pieces in favour of one Odyappa Chettiar. Later he charged the remaining two to him. On May 19, 1936, all four pieces of land were transferred by Odyappa Chettiar to Man and Siah both now deceased.

On July 14, 1936, an agreement was made between the plaintiff on the one side and Man and Siah on the other in which the latter agreed to transfer the land to the plaintiff on payment of the sum of $1,300 to be paid within 5 years.

The respondent contended that about two years after July 14, 1936, he paid the $1,300. He obtained possession of the titles relating to two pieces of the land but went into possession of all four pieces of land. However the two pieces comprising No. 30415 & 30416 in Surat Putus were not transferred to him.

On the death of Siah and Man (who died on September 5, 1940 and November 10, 1944 respectively) the respondent applied for letters of administration in respect of the estate of Siah and obtained on March 12, 1941 and on September 15, 1957, the appellant (defendant) obtained letters of administration in respect of the estate of Man.

On August 12, 1958, the plaintiff commenced the present proceedings against the defendant as administratrix of the estate of Man asking for performance of the agreement dated July 14, 1936 in so far as that agreement entitled him to have transferred back to him the land comprised in Surat Putus Nos. 30415 & 30416. The trial Judge found as a fact that the whole of the $1,300 had been paid by the plaintiff and he accordingly gave judgment in his favour and that he was not barred by the Statute of Limitations. The defendant appealed.

Held, allowing the appeal: the Kedah Limitation Enactment applied and the present proceedings were statute barred.

Case referred to:—

(1) *Ponnusamy & Anor.* v. *Nathu Ram* [1959] M.L.J. 86.